Supreme Court, U.S.
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90-1404

No.

In The
Supreme Court of the United States
October Term, 1990

JONATHAN C. SCOTT,

Petitioner,

vs.

ESTATE OF JENNIE MANDEL BARNETT, RHODA HERSCHLER GREENBERG AND MICHAEL HERSCHLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO, TENTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether or not the Full Faith and Credit Clause provisions of Article IV, Section 1 of the United States Constitution prohibits a sister state from vacating a judgment rendered by a court of competent jurisdiction in another state absent a showing that the judgment is void for want of jurisdiction or for some other substantial reason?

2. Whether or not the Full Faith and Credit Clause provisions of Article IV, Section 1 of the United States Constitution and the due process provisions of the 14th Amendment to the United States Constitution prohibit a sister state from granting the judgment debtors, residents of that state, a stay of enforcement of the foreign state judgment without requiring any security therefore and upon an ex-parte application predicated upon conclusory allegations that the debtors did not engage in any of the acts specified in the long-arm statute?

3. Whether or not the requirements of Full Faith and Credit and of due process of law prohibit the appellate Courts of the state where enforcement is sought from granting the judgment debtors a second hearing in which to adduce evidence in

support of the motion to vacate and require the appellate Court to decide the legal issues presented rather than remanding for another evidentiary hearing where the proceedings to vacate the judgment have been pending for some four and one-half years?

PARTIES

The appellant in the Court of Appeals for Franklin County, Ohio was Jonathan C. Scott. The appellees were the Estate of Jennie Mandel Barnett, Rhoda Herschler Greenberg and Michael Herschler.

All of the parties sought review in the Supreme Court of Ohio of the determinations made by the Court of Appeals of Ohio.

PETITION FOR A WRIT OF CERTIORARI-

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vs.

ESTATE OF JENNIE MANDEL BARNETT, RHODA HERSCHLER GREENBERG AND MICHAEL HERSCHLER,

Respondents

JONATHAN C. SCOTT (hereafter SCOTT) respectfully petitions this Court to issue a Writ of Certiorari to review two decisions of the Court of Appeals of Ohio, Tenth Appellate District, rendered May 10, 1990 and on August 28, 1990, which refused to enforce a foreign state money judgment rendered by the Supreme Court of the

State of New York, County of Suffolk on July 7, 1986 in his favor against former residents of the State of New York.

OPINIONS BELOW

The entry of the Supreme Court of Ohio, dismissing the appeal taken by all parties from the decisions of the Court of Appeals was made by the Chief Justice on November 28, 1990 (A.1).

The decisions of the Court of Appeals of Ohio were entered May 10, 1990 and August 28, 1990 (A.2-17).

The judgment of the Court of Common Pleas vacating judgment was entered on October 21, 1988 (A. 18).

The report of the Referee of the Court of Common Pleas was made on August 4, 1988.

JURISDICTIONAL STATEMENT

This petition seeks review of two decisions entered by the Court of Appeals of Ohio, Tenth Appellate District.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (2).

This petition is timely filed within ninety days of the date of the entry of Supreme Court of Ohio, dismissing the appeal upon its opinion that there

was no substantial Constitutional question presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be deprived of life, liberty or property without due process of law".

2. Article IV, Section 1 of the United States Constitution provides, in pertinent part:

> "Full Faith and Credit shall be given in each state to the public acts, Records and judicial Proceedings of every other State"

3. Ohio Revised Code Section 2329.02.11 provides:

> "Foreign judgment" defined.
>
> As used in sections 2329.021 [2329.02.1] to 2329.027 [2329.02.71 of the Revised Code, "foreign judgment" means any judgment, decree, or order of a court of the United States, or'of any court of another state, that is entitled to full faith and credit in this state.

4. Ohio Revised Code Section 2329.02.2, provides:

A copy of any foreign judgment authenticated in accordance with section 1738 of Title 28 of the United States Code, 62 Stat. 947 (1948), may be filed with the clerk of any court of common pleas. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of common pleas. A foreign judgment filed pursuant to this section has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of common pleas and may be enforced or satisfied in same manner as a judgment of a court of common pleas.

5. Ohio Revised Code Section 2117. 06, entitled "Presentation and allowance of creditor's claims; statements and notices required," provides:

(A) All creditors having claims against an estate, including claims arising out

of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) To the executor or administrator in writing.

• • •

(B) All claims shall be presented within three months after the date of the appointment of the executor or administrator, except that claims

• • •

(C) In the absence of any prior demand for an allowance, the executor or administrator shall allow or reject all claims • • • within thirty days after their presentation; • • • Upon the allowance of a claim, the executor or administrator, on written demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date

of such allowance.

* * *

(E) Any person whose claim has been presented and not thereafter rejected, is a creditor **. Claims that are contingent need not be presented except as provided in section 2117.37 to 2117.42 of the Revised Code, but whether presented pursuant to those sections or this section, contingent claims may be presented in any of the manners described in division (A) of this section.

6. Ohio Revised Code Section 2117.11, entitled "Rejection of Claim" provides:

An executor or administrator shall reject a creditor's claim against the estate he represents by giving the claimant written notice of the disallowance thereof. ***

A claim is rejected if the

executor or administrator, on
demand in writing by the claimant
for an allowance thereof within
five days, which demand may be made
for the presentation or at any time
thereafter, fails to give to
claimant, within such period,
a written statement of the allowance
of such claim. Such rejection shall
become effective at the expiration
of such period.

7. New York Civil Practice Law and Rules § 302 is set forth in the appendix at A. 14)

STATEMENT OF THE CASE

On November 5, 1982, defendant Rhoda Greenberg was appointed Executrix of the Estate of Jennie Mandel Barnett by the Probate Court of Franklin County, Ohio. On January 24, 1983, plaintiff Jonathan C. Scott, through his attorney, demanded a return by the estate of two diamond rings of which he was the beneficial owner. The executrix did nothing in response to the filing of

that letter.

In 1984, Jonathan Scott, a resident of the State of New York, filed suit in the Supreme Court of New York, Suffolk County, against the Estate of Jennie Mandel Barnett and the other defendants on the basis that the decedent, while a resident of New York, was entrusted with those rings by plaintiff's father, a New York resident. The decedent agreed to hold those rings for the benefit of plaintiff until he turned 21, at which time they were to be delivered to him in the State of New York. That trust was breached by the decedent by her delivery of the rings to the other two defendants herein, who were married to each other at the time. All three defendants had been residents of the State of New York. The record further showed that even after moving outside of the state of New York, Rhoda Herschler and the decedent Jennie Mandel Barnett received revenue from real estate holdings and other investments in the State of New York.

Not only did all defendants herein not defend that New York complaint served upon them, but the estate beneficiaries specifically directed the fiduciary not to expend funds to defend that action.

The Franklin County, Ohio Probate Court acceded to those wishes by denying authority to so expend funds.

As a result of the failure to defend the New York lawsuit, a default judgment was rendered in favor of the petitioner. At an inquest in which the defendants declined to participate, the Supreme Court of the State of New York, County of Suffolk found that it had jurisdiction over the subject matter and over the parties. In addition, the Court found, on the basis of the testimony offered at the inquest, that the decedent breached the trust and converted property of which Jonathan C. Scott was the beneficial owner. Neither the Estate or the individual defendants ever moved to vacate the judgment in the New York State Courts, nor did they appeal the judgment, despite notice to them of its entry.

A money judgment, in the amount of $24,289.58 was entered by the Supreme Court of the State of New York, County of Suffolk on July 7, 1986. That judgment was then duly authenticated pursuant to 28 U.S.C. 1738 and on August 29, 1986, was filed in the Franklin County Court of Common Pleas as a foreign judgment pursuant to Ohio Revised Code 2329.022.

Thereafter, defendants at various times filed motions to vacate that judgment, to stay enforcement thereof, and for evidentiary hearings. Jonathan C. Scott resisted all of those motions and sought enforcement of the judgment.

On June 24, 1987, a hearing was held before a referee of the Court of Common Pleas at which the testimony of defendants, Rhoda Greenberg and Michael Herschler, was admitted over the objections of plaintiff's counsel. The objected to testimony involved an attempt by the defendants to re-litigate the merits of the foreign state judgment in the Ohio Courts. Thereafter, on August 4, 1988, or thirteen and one-half months following the hearing, the referee recommended that the foreign judgment be vacated on the basis that he found that: (1) contrary to the findings of fact by the New York Court, none of the defendants had minimum contacts with the State of New York to invoke its long arm jurisdiction statute; (2) contrary to the findings of fact by the New York court, no trust of such rings existed; and (3) that plaintiff's claim against the estate was barred since the New York lawsuit was commenced more than two months after what the referee found to be the automatic rejection of the

claim pursuant to Ohio R.C. 2117.11.

Jonathan C. Scott timely filed objections to the Report of the Referee, which objections were overruled by the Court of Common Pleas decision filed September 22, 1988. A judgment entry journalizing that decision was filed October 21, 1988.

On May 10, 1990, the Court of Appeals for Franklin County, Ohio found error in the Referee's re-consideration of the merits of the claim (A. 16). However, the Court of Appeals nevertheless remanded the case to the trial Court to determine the issues of law presented. Motions for re-consideration filed by the parties were granted in that upon re-consideration the Court abided by its decision to remand the cause for a second evidentiary hearing and it affirmed the Referee's opinion that the claim against the Estate was time barred. The decision on the motions for re-consideration were rendered August 28, 1990 (A. 2).

On November 28, 1990, the Court of Appeals of Ohio dismissed the appeal and cross-appeal taken by the parties from the decision of the Court of Common Pleas (A. 1).

REASONS FOR GRANTING THE WRIT

A. THE WRIT SHOULD BE GRANTED BECAUSE THE REFUSAL OF THE OHIO STATE COURTS TO ENFORCE A JURISDICTIONALLY VALID JUDGMENT OF A SISTER STATE COURT VIOLATES THE REQUIREMENTS OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION AND THE WRIT SHOULD BE GRANTED BECAUSE THE OHIO APPELLATE COURT'S ABDICATION OF ITS RESPONSIBILITY TO DECIDE DISPOSITIVE ISSUES OF LAW RATHER THAN REMANDING THE CAUSE CONSTITUTES A VIOLATION OF DUE PROCESS.

It is respectfully submitted that this case presents important issues of law concerning the credit Constitutionally due a judgment of a sister state and the procedures mandated for determination of these issues under a uniform enforcement of foreign judgment act such as that enacted in Ohio and in many other state jurisdictions.

Petitioner respectfully submits that the refusal to give any credit to a judgment rendered by a sister state Court of competent jurisdiction renders meaningless the requirement of full faith

and credit. Such a decision, strongly indicative of partiality of the local Court to its own residents, undermines confidence in the judicial system and serves to create an atmosphere of disrespect for the determinations made by a sister state Court. It is essential in a society where residents of various states engage in transactions of all different types with each other that a forum be available to redress any disputes. There is nothing improper about bringing suit in the forum in which the plaintiff resides provided that traditional notions of fair play and substantial justice are not offended by haling the defendants into that Court.

While the Court of Appeals of Ohio referred to the doctrine of full faith and credit, a careful analysis of the basis of its decision indicates that in fact the doctrine was completely ignored. The Court of Appeals found that the Referee's conclusions as to vacatur of the judgment were erroneous. According the judgment Full Faith and Credit, the appellate Court should have enforced the judgment. Instead, it decided to remand the case to the trial Court for another hearing for the purpose of determining the purely legal issues of 1) whether the judgment against the Estate was rendered void by Ohio law

concerning claims against Estates; 2) whether the Referee will reach a different decision applying the law of the State of New York concerning long-arm jurisdiction. Further, despite the Court's acknowledgement that the only evidence at the hearing concerning jurisdiction over the Estate indicated substantial contacts by the decedent Jennie Mandel Barnett in the State of New York in relation to the cause of action, the Court decided, without any request therefor, to order a second evidentiary hearing, essentially giving the Estate a second chance to litigate the issue of jurisdiction. Upon re-consideration the Court of Appeals ruled that the issue of the non-claim statute had already been determined and it thereupon upheld that determination.

In the present case, no determination has been made by the Ohio State Courts that it was fundamentally unfair to expect the defendants to defend the lawsuit in New York. The cause of action arose in the State of New York and had its genesis in a trust between petitioner's father, Paul Scott and petitioner's grandmother Jennie Mandel Barnett, who at the time of its making were both lifetime residents of the State of New York. The trust called for delivery in the State of New York

of two diamond rings on a future date to Jonathan C. Scott, a New York resident. The defendants Rhoda Herschler Greenberg and her former husband Michael Herschler were previously long-time residents of the State of New York and following their relocation out of state, they derived revenue from at least one real estate investment made in the State of New York. These jurisdictional facts, which were not controverted by any competent evidence proferred by the defendants, supported in personam jurisdiction over them. Further, the Court which rendered the judgment, the Supreme Court of the State of New York, was vested with general jurisdiction to hear and determine claims of the type asserted (breach of trust and conversion of property). Over the objections of Jonathan C. Scott, the Ohio Courts granted the defendants an evidentiary hearing on the motion to vacate judgment, based solely upon the conclusory assertion that they had not engaged in any of the acts set forth in New York's long-arm statute as the basis for jurisdiction. On appeal, the determination of the Referee to vacate the judgment was reversed but the Court of Appeals, rather than reaching the jurisdictional claim,

remanded the cause for a second evidentiary hearing. This action was taken despite the absence of any claim by the defendants that the first evidentiary hearing was improperly curtialed.

Petitioner respectfully submits that the refusal of the Ohio appellate Courts to review the issues of law presented and its determination to remand the cause for another hearing for the benefit of the resident defendants in the absence of any request for same, some four years after the foreign judgment was filed, is indicative of the implementation of procedures designed to frustrate and indefinitely delay enforcement of a judgment by a non-resident judgment creditor. It is respectfully submitted that such a course of action is inconsistent with and represents an abdication of the responsibility of the State appellate Courts to determine issues of law dispositive of the enforcability of the foreign state judgment. Further, it is submitted that such action is inconsistent with the spirit and the letter of the Full Faith and Credit Clause as well as a violation of the rights of Jonathan C. Scott to due process of law.

The State of Ohio recognizes the application of the Full Faith and Credit Clause

and provides means by which a foreign judgment may be filed under R.C. 2329.022.

On August 29, 1986, plaintiff followed the statutory framework under Revised Code 2329.022 by filing an exemplified copy of the New York judgment, along with notice to the debtor and a praecipe. Under the Full Faith and Credit Clause, a judgment is subject to non-enforcement only if the Court which rendered the judgment lacked competence to do so, either due to a lack of jurisdiction over the person or over the subject matter Roche v. McDonald, 275 U.S. 449, 451, 452 (1928).

In Burger King v. Rudzewicz, 471 U.S. 462 (1985), this Court found that traditional notions of fair play and substantial justice were not offended in requiring Michigan residents to defend a diversity lawsuit brought in the U.S. District Court in Florida on the basis of a breach of a franchise agreement calling for payments to be made to the plaintiff in the State of Florida. This Court found that the defendants were subject to suit in Florida under that state's long-arm statute even though they never were physically present in that state, it being sufficient that an economic injury arose from the actions of the

defendant purposely directed toward forum residents.

In the present case, the record indicates that defendant Rhoda Herschler Greenberg was fully aware when she sold the two diamond engagement rings and retained the money for the benefit of herself and her husband Michael Herschler that the diamond rings were the property of a resident of the State of New York. Therefore, by taking property of a New York resident, selling it and keeping the proceeds for themselves, defendants were purposely acting to cause economic injury to a forum (New York state) resident. The trust agreement breached by the decedent was entered into with petitioner's father while they were both residents of the State of New York. The decedent was a resident of the State of New York for some fifty years and she derived substantial revenue from activities in the State of New York. It is unrefuted that Jennie Mandel Barnett entered into a contract, on or about November 25, 1963, in the State of New York, where she was then domiciled, with Jonathan Scott's father, also a New York domiciliary, calling for performance of the contract to be tendered in the State of New York,

within a future specified time. Jennie Mandel Barnett performed purposeful acts within the State of New York in relation to the contract entered into with Paul Scott in that she took possession of two diamond rings, safeguarded them for the benefit of Jonathan Scott and retained complete control over them, within the State of New York, up to and including the time that she moved outside the boundaries of said state in the year 1971. Jennie Mandel Barnett's purposeful acts, as outlined above, performed within the State of New York over an eight year period of time, and additional purposeful acts whereby she availed herself of the benefits and protection of New York law in the conduct of business related to diversified real estate activities and other commercial transactions, supplies a substantial basis for the New York Court's exercise of long-arm jurisdiction over the Estate.

Long-arm jurisdiction under New York CPLR Section 302 (a) (1) is extended to a non-domiciliary (or the Estate of a non-domiciliary) who transacted any business within the State of New York, where the defendant was a New York domiciliary at the time that the subject business

was transacted. The statute applies to confer jurisdiction over disputes concerning commercial contracts entered into in the State of New York (Sharp Exports, Ltd. v. Mulco Products, Inc., 50 Misc.2d 611, 270 N.Y.S.2d 787 (Sup. Ct., Nassau Cty. 1966) as well as to contracts of a personal nature involving transactions between members of the same family (Underwood v. Underwood, 92 Misc.2d 359, 399 N.Y.S.2d 967 (Sup Ct., Westchester Cty. 1977); Abbate v. Abbate, 82 A.D.2d 368, 441 N.Y.S.2d 506 (2d Dept. 1981); Kassuto v. Talon, 77 Misc.2d 132, 353 N.Y.S.2d 291 (Sup. Ct., Kings Cty. 1974) (Ohio resident subject to suit in New York under long-arm statute based upon execution of matrimonial separation agreement in New York). It is submitted that the record here fully supports the New York Court's jurisdiction over the Estate and that the Estate's denial of its awareness of the decedent's purposeful activities in the State of New York should not be deemed sufficient to undo the judgment of the State of New York, which is entitled to recognition under the full faith and credit clause of the United States Constitution. This is especially true where it is apparent from the record that Rhoda Herschler

Greenberg and Michael Herschler, upon whose affidavits the Estate relied for its motion to vacate the judgment, had no basis of knowledge of Jennie Mandel's transaction of business in the State of New York in 1963 since they moved outside of the State of New York in 1959 (where they lived with the decedent). It is respectfully submitted that the Estate completely failed to establish by competent evidence good grounds to invalidate the foreign judgment.

Despite any basis to vacate the judgment, the Ohio Courts not only refused to enforce the New York judgment but also failed to address the issues of law and granted not one but two evidentiary hearings on the issue of jurisdiction.

It is respectfully submitted that the requirements of Full Faith and Credit compel the sister state Court to enforce the judgment to the extent that it would be enforced by the rendering state. Under New York Law, a default judgment such as that rendered and filed with the Court of Common Pleas, is considered to be a determination on the merits as to all issues which were or could have been raised in the action and acts as a bar to further litigation between the parties with regard to the same subject matter.

(Cf. Collins v. Bertram Yacht Club, 42 N.Y.2d 1033 (1977), 399 N.Y.S.2d 202, 369 N.E.2d 758. In addition, a judgment on the merits results in a merger and bar of all defenses which were or could have been raised as to the merits of the action (Cf. Gerzof v. Gerzof, 57 A.D.2d 821, 395 N.Y.S.2d 26 (1st Dept. 1977). New York Courts give the same preclusive effect to a default judgment as a judgment based upon a determination made after a trial. The grounds contained in the statute authorizing vacatur of a judgment, such as lack of jurisdiction to render the judgment, excusable neglect in default, or fraud perpetrated by the other party in obtaining the judgment, are exclusive and in the absence of such grounds, an unappealed determination contained in a judgment, settling the rights of the parties, should not be disturbed (Cf. Matter of Huie, 20 N.Y.2d 568, 285 N.Y.S.2d 610, 232 N.E.2d 642 (New York Court of Appeals, 1967). For that reason, petitioner respectfully submits that the Ohio Courts should not have permitted the Estate to pursue an unpleaded notice of claim defense where the failure to raise the issue in the New York Courts would result in a waiver of same upon the entry of the judgment. Even if the

defense had been properly raised, it should have been rejected as lacking in merit. The Court of Appeals of Ohio accepted the Estate's specious argument that petitioner's attorney's letter demanding that the Estate return his property constituted a creditor's claim and a "demand for an allowance" of his claim. When petitioner's aunt, one of the people who converted the rings to her own use, thereafter ignored the letter demanding the return of the property for obvious reasons, this "silence" was construed as a rejection of Jonathan Scott's claim against the Estate since it was held by the Court. This conclusion was reached by construing a demand for return of property not belonging to the Estate as a "demand for an allowance" against the estate.

The defense of failure to timely commence the action in New York within the time limited by the Ohio statute should have been raised in the New York action as an affirmative defense. Failure to raise the defense of failure to timely commence an action results in a waiver of that defense. Doroski v. Mintler, 49 A.D.2d 990, 374 N.Y.S.2d 721 (3rd Dept. 1975). New York Courts have required that a defendant, if claiming the benefit and application of the law of a sister state,

must raise the application of that law as a defense to permit the Court to pass upon the defense. Raul v. Morrison, 282 A.D. 1042, 126 N.Y.S.2d 896 (1st Dept. 1933).

Here, the Estate deprived the New York Court of the opportunity to pass upon its contention that the claim was barred by the limitation provided under R.C. 2117.12. Instead, the Estate, with full knowledge of the availability of such a purported defense and a full and fair opportunity to defend the action in New York, voluntarily chose to ignore the New York proceedings.

Ohio R.C. 2117.06 provides the procedure for filing claims against an Ohio estate. R.C. 2117.11 provides two methods by which claims may be rejected. Non-action by the fiduciary is deemed a rejection of a claim only if the claimant makes a "demand for an allowance". (See the second paragraph of R.C. 2117.11). Here, the January 24, 1983 letter from plaintiff's attorney to the Executrix of the Estate did not make a demand for an allowance or fix any amount upon the rings being held in trust for appellant. The word "allowance" does not appear in that letter. The statutory scheme requires that a claim must

be made but imposes no requirement that a "demand for an allowance" be made.

Ohio R.C. 2117.06 provides a mandatory method to present claims. In Ohio R.C. 2117.11, the General Assembly has provided a mandatory manner to reject presented claims and a distinct provision for rejection if the claimant "demands an allowance". In the first instance, the fiduciary controls the two month statute of limitations by positively rejecting a claim. In the second instance, the claimant can control the statute of limitations by "demanding an allowance". However, since the claimant: (1) must present his claim; as well as (2) demand an allowance if he chooses to do so, then the "demand for allowance" must be specific if fiduciary non-action commences the time to file suit. The construction given by the lower Courts is irrational and will lead to absurd results since it interprets the presentment of a claim to be a demand for an allowance which is rejected by the silence of the fiduciary.

The two diamond rings, property of Jonathan C. Scott, was not the Estate's property and therefore, the requirements of Ohio R.C. 2117.06 and R.C. 2117.11 were not prerequisites

to the commencement of suit in New York. In 33 Ohio Jur.3d Decedent's Estate's Section 1435, Subd. 2, "What Constitutes Debts and Obligations of Estate, page 335 it is stated that a person who asserts a right as legal or equitable owner of assets being administered by an estate is not required to present his "claim" to the administrator before bringing an action. See also Pay Less Drug Stores v. Bechdolt, 92 Cal.App.3d 496, 155 Cal.Rpt. 58 (Court of Appeals, Third District 1979) (reaching the same result in construing analogous state statute); Reed v. Sixth Judicial District Court (1959), 75 Nev. 328, 341 P.2d 100, 73 A.L.R.2d 879 (Supreme Court of Nevada 1959) (same holding).

The language of petitioner's attorneys letter clearly indicates that he was making a claim against the Estate not as a creditor's claim under R.C. 2117.06, but as notice to the Estate he was the beneficial owner of the two diamond rings and demanded their return. The letter further notified the Estate that legal action would be brought for the improper retention or disposition of the rings if they were not returned to plaintiff's attorney on February 4, 1983, some eleven days after the letter was dated. The letter did not contain the

word "allowance" nor did it demand an allowance "within five days", in accordance with the requirements of R.C. 2117.11. Petitioner submits that the lower Court's acceptance of the specious argument that Rhoda Herschler Greenberg's failure to timely respond to that letter constituted an unequivocal rejection of a demand for an allowance was in error. This letter did not constitute a demand for allowance of a claim under R.C. 2117.11. A presumption of rejection of a claim does not arise unless such a demand is made and not acted upon within five days. The claimant is only required to present a claim to the fiduciary in a timely manner. Accordingly, as no demand for an allowance was made or required, no presumption of rejection should be presumed from the Executor's failure to respond to the letter or to return the property.

Plaintiff's action was timely filed in the Supreme Court of the State of New York. The statutory rejection of a claim was not implicated since no demand for an allowance had been made which would trigger the application of statutory rejection by the silence of the fiduciary.

In summary, as no irregularity was demonstrated as the basis for vacating the New

York judgment, Full Faith and Credit required the Ohio Courts to enforce the judgment. It did not authorize the Ohio Courts to order an evidentiary hearing upon ex-parte application, to disregard the conclusiveness to which the judgment was entitled under New York law, to inordinately delay the decisions on the issues and to remand the case for an additional evidentiary hearing designed to give the state residents another opportunity to adduce evidence, which it failed to produce at the first hearing in support of the motion to vacate. A review of the record in this case gives the appearance of partiality by a state Court to its residents and against a foreign state resident with a jurisdictionally valid judgment, a situation which the Full Faith and Credit Clause was designed to prevent.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
February 16, 1991

Respectfully Submitted,

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APPENDIX

THE SUPREME COURT OF OHIO

1990 TERM

To wit: November 28, 1990

Jonathan C. Scott,
Appellant/Cross-Appellee,

Case No.

90-1233

V.

ENTRY

Estate of Jennie Mandell Barnette et al.,
Appellees/Cross-Appellants.

Upon consideration of the motion and cross-motion for an order directing the Court of Appeals for Franklin County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:
Motion Fee, $40.00, paid by Douglas E. Hoover.

COSTS:
Motion Fee, $40.00, paid by Steven M. Soltis.
(Court of Appeals No. 88AP1063)

s/ THOMAS J.MOYER

Chief Justice

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jonathan C. Scott,

Plaintiff-Appellant,

V.

Estate of Jennie Mandell Barnette, in Care of Bryan B. Johnson, Administrator de bonis non WWA, [Rhoda Herschler Greenberg, as Executrix of the Estate of Jennie Mandell Barnette, Michael Herschler, and Rhoda Herschler Greenberg],

Defendants-Appellees.

No. 88AP-1063

(REGULAR CALENDAR)

DECISION
Rendered on August 28, 1990

MR. DOUGLAS E. HOOVER, for appellant.

MR. STEVE M. SOLTIS; IGO & IGO, and MR. RICHARD B. IGO, for appellees.

ON MOTIONS for Reconsideration.

BOWMAN, J.

Plaintiff-appellant, Jonathan C. Scott, and defendants-appellees, the estate of Jennie Mandell

Barnette, Rhoda Herschler Greenberg, as executrix of the estate of Barnette, Rhoda Herschler Greenberg, individually, and Michael Herschler, have filed motions for reconsideration of our opinion rendered on May 10, 1990, contending that this court erred in several respects.

This court in Matthews v. Matthews (1981), 5 Ohio App. 3d 140, has stated that the test generally applied on a motion for reconsideration is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered when it should have been.

Turning first to the argument presented by both appellant and appellees, namely, that the referee had already determined that, the question of jurisdiction notwithstanding, appellant's claim against appellees, the estate of Barnette and Greenberg, executrix of the estate, was Barred by R.C. 2117.06, 2117.11 and 2117.12, we must concede that this court failed to fully consider the issue in our prior opinion. Specifically, our opinion stated that, upon remand, the trial court must determine whether appellant's claim was timely initiated against the estate of Barnette. However, the report of the common pleas court referee referenced in its findings of fact a letter written by appellant to appellees, dated January 24, 1983, wherein appellant made a specific demand upon the estate of Barnette for return of the disputed rings. The letter stated further that if the rings were not returned on or before February 4, 1983, legal action would be instituted. R.C. 2117.11 states that a claim is rejected if the executor, on demand in writing by

the claimant for an allowance thereof within five days, fails to give to the claimant, within such period, a written statement of the allowance of such claim. The referee found that appellee, Greenberg, as executrix of the estate, failed to respond in any way to the letter and that appellant did not file the instant suit in New York, claiming ownership of the rings, until June 1984. The referee concluded that the failure of the executrix to respond timely as demanded was a plain and unequivocal rejection of that demand, and that appellant's claim against the estate and executrix was thereby barred as being without the two-month tilne frame of R.C. 2117.12.

Upon further consideration of the relevant statutes, we must agree that, in fact, the referee made a specific finding that appellant's claims against the estate were not timely filed and are barred. However, we observe that, in so finding, the referee failed to consider whether the time bar set out in R.C. 2117.12 constitutes a statute of limitation or non-claim statute, or whether it is a special statutory limitation. If the former, the referee must determine whether it was waived as a defense by appellees by their failure to either affirmatively plead the statute or defend by motion when suit was filed in New York. Hoover v. Sumlin (1984), 12 Ohio St. 3d 1. If, however, R.C. 2117.12 constitutes a special statutory limitation which qualifies a right given by the statute, then lapse of the statutory time may extinguish jurisdiction in the court to hear it. Christensen v. Maxen (1938), 29 Ohio Law Abs. 219. Inasmuch as jurisdiction may be collaterally attacked, it is possible that appellees were not obligated to raise the issue of a statutory time bar in New York. In either instance, the question is best left to the trial court to determine

and, in accordance with our previous opinion, the third assignment of error is sustained, albeit with the amplification set out herein.

Regarding the remainder of the arguments set forth in the two motions for reconsideration, we find that they raise neither errors nor facts which were not fully considered by this court in our previous opinion. Appellees argue that, under New York law, New York had no jurisdiction over the parties. We reversed and remanded the decision of the trial court in part, based on the referee's failure to determine the question of jurisdiction under relevant New York law. Hence, the numerous cases cited by appellees in their motion for reconsideration would best be considered in the trial court upon remand. Appellees also argue that, under New York law, New York specifically lacked jurisdiction over the decedent. Given our previous holding in this decision that appellant's claim against the estate and the executrix are barred by tune limitations, this issue need not be addressed as it is now moot.

Appellees' final argument on the issue of jurisdiction is that this court erred in determining that, under the doctrine of res judicata and in light of the Full Faith and Credit Clause of the United States Constitution, the New York judgment cannot be vacated on the merits. It is appellees' argument that, since the merits of the case were not litigated in New York and the merits of the case conferred jurisdiction, appellees are entitled to dispute the merits in Ohio. Although it is true that in this case the question of the merits overlaps to a large extent the question of jurisdiction, thus necessitating discussion of one to reach resolution of the other,

they are distinct legal issues and, in this matter, we have no occasion to reconsider our former opinion.

Finally, appellees argue that their motion to vacate was not dependent upon Civ. R. 60(B) and, consequently, that our conclusions in this regard were erroneous. However, in our discussion of this issue, we determined that to the extent the trial court relied on Civ. R. 60(B), the court was in error. Appellees, in the instant motion for reconsideration, have presented no new arguments and thus have provided no basis for reconsideration.

Appellant makes two arguments in his motion for reconsideration: first, that his claim was not barred by the non-claim statutes, which issue we have already discussed; and second, that jurisdiction over the decedent by New York was confessed by appellees' failure to contradict any of the evidence on that issue presented by appellant. However, as we stated previously in our opinion, the issue of personal jurisdiction is one that leaves a judgment open to collateral attack in Ohio. Appellant has not demonstrated any error in our previous decision, and we therefore decline to reconsider this issue.

Based on the foregoing, the motions for reconsideration filed by both appellant and appellees are granted. Upon reconsideration, appellant's first, second and fourth assignments of error are sustained and the fifth assignment of error is overruled in accordance with the prior opinion of this court rendered on May 10, 1990; appellant's third assignment of error is sustained in accordance with this decision; the judgment of the Franklin County Court of Common Pleas is affirmed in part

and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and this decision.

Motions for reconsideration granted; judgment affirmed in part and reversed in part and remanded.

REILLY, P.J., and BRYANT, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jonathan C. Scott,

Plaintiff-Appellant,

V.

Estate of Jennie Mandell Barnette, in Care of Bryan B. Johnson, Administrator de bonis non WWA, [Rhoda Herschler Greenberg, as Executrix of the Estate of Jennie Mandell Barnette, Michael Herschler, and Rhoda Herschler Greenberg),

Defendants-Appellees.
No. 88AP-1063

(REGULAR CALENDAR)

OPINION
Rendered on May 10, 1990

MR. DOUGLAS E. HOOVER, for appellant.

MR. STEVE M. SOLTIS; and MR. RICHARD B. IGO, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

Plaintiff-appellant, Jonathan Scott, appeals from a judgment of the Franklin County Court of Common Pleas granting defendants-appellees' Civ. R. 60(B) motions to vacate the foreign default judgment entered against them in the state of New York which appellant sought to enforce in Ohio

pursuant to R.C. 2329.021 et seq.

Five assignments of error are raised for our review:

"I. The October 21, 1988 judgment of the Court of Common Pleas vacating the foreign judgment violates the Full Faith and Credit provisions of Article IV, Section 1 of the United States Constitution.

"II. The lower court erred by making independent factual determinations on the merits of plaintiff's judgment that defendants lacked minimal contacts in New York to invoke that state's long arm jurisdiction statute and that no trust existed in New York, which findings were in contravention of the finding of the New York court.

"III. The lower court erred by finding that plaintiff's judgment against the estate is barred by R.C. 2117.11 and .12.

"IV. The lower court erred by granting the motions of defendants Rhoda Greenberg and Michael Herschler to vacate the foreign judgment as against them.

"V. The lower court erred by failing to rule upon plaintiff's motion for reconsideration and the objected to report of the referee regarding discovery."

Appellant and his father, Paul Scott, are residents of New York. Jennie Mandell Barnette ("Barnette"), now deceased, was appellant's grandmother and was a resident of New York until 1971 when she moved to Ohio. Appellant contends that, in 1963 in New York, Barnette agreed to safeguard and keep two diamond rings given to her by her son Paul Scott for the benefit of appellant until appellant turned twenty-one.

Barnette died in 1982, and her estate is being administered in Probate Court in Franklin County, Ohio.

On August 29, 1986, appellant filed in the Franklin County Court of Common Pleas, pursuant to R.C. 2329.022, an authenticated copy of a foreign default judgment which had been rendered in New York on July 7, 1986, against the estate of Barnette, Rhoda Herschler Greenberg ("Greenberg") as executrix of the estate of Barnette, Rhoda Herschler Greenberg individually and Michael Herschler ("Herschler")[1]. The New York action was premised on the alleged contract/trust agreement entered into between Barnette and Paul Scott which appellant alleges was breached in 1974 when Barnette gave the rings to her daughter, Greenberg. Greenberg and her husband at that time, Herschler, subsequently sold the rings and retained the cash received. Appellant obtained judgment in New York in the amount of $24,289.58 plus interest.

On September 26, 1986, the estate of Barnette moved the court to vacate the foreign judgment on the ground that New York lacked personal jurisdiction. Submitted in support of the motion were affidavits from Greenberg and Herschler. Greenberg and Herschler likewise filed a motion

1. At some point after commencement of the action in Ohio, Bryan B. Johnson was appointed administrator de bonis non WWA by the probate court, but he is a party to this action only insofar as the estate of Barnette may be obligated to appellant.

to vacate the judgment against them as individuals on May 29, 1987, also arguing that the New York court lacked jurisdiction over them. A hearing to decide both motions was held before a referee of the court on June 24, 1987, at which Greenberg and Herschler testified.

On August 4, 1988, the referee rendered a report containing findings of fact and conclusions of law which stated, in part, as follows:

"FINDINGS OF FACT

"1. Plaintiff filed his lawsuit against Defendants in the State of New York in June, 1984, and soon thereafter obtained service upon all Defendants in Ohio. The Defendants chose not to respond to the Complaint, making the decision to allow a default judgment to be entered against them in the New York Court. With respect to the Defendant Estate of Jennie Mandel Barnette, Probate Judge Richard D. Metcalf refused to allow the expenditure of funds to defend against the New York lawsuit. None of the Defendants named in that action were then residents of New York. Jennie Mandel Barnette, now deceased, had moved to Ohio in 1971, and had died in September, 1982.

"2. The subject matter of the New York action was two diamond rings, which had been the property of Jennie Mandel Barnette. In 1974, Jennie Mandel Barnette had given the two rings to Defendant Rhoda Herschler Greenberg (both women were then Ohio residents), who had sold them for money. This Referee finds as a matter of fact that Jennie Mandel Barnette gave the two diamond rings to Defendant Rhoda Herschler Greenberg free and clear, and not to hold in trust for anyone.

• • •

"CONCLUSIONS OF LAW

"1. This Referee concludes as a matter of law that

the Defendants have timely filed their motions to vacate the judgment.

"2. This Referee concludes as a matter of law that the Defendants had not had the minimum contacts with the State of New York necessary for the New York Court to acquire personal jurisdiction over the Defendants pursuant to the New York 'long-arm' jurisdiction statute.

"3. This Referee concludes as a matter of law that the Defendants acted reasonably in not defending the action which Plaintiff was prosecuting in New York, in that the New York Court had not obtained personal jurisdiction over any of the Defendants.

"4. This Referee concludes as a matter of law that the Defendants have three colorable defenses to present on the merits with respect to the allegations made by Plaintiff in the New York lawsuit. The first is the New York Court's lack of personal jurisdiction. The second is Defendants' contention that the two diamond rings were owned free and clear by Jennie Mandel Barnette and then by Rhoda Herschler Greenberg, thereby defeating Plaintiff's contention that he was the beneficial owner of the rings which were only being held in trust for him by Jennie Mandel Barnette.

"Defendants' third defense is that Plaintiff's claim is barred by the operation of O.R.C. Sections 2117.06, .11, and .12, which provide that a person, whose claim against a decedent's estate has been rejected, must file an action on the claim within two months after such rejection or be forever barred from maintaining an action thereon. Plaintiff failed to comply with this statutory requirement, not filing his action in the New York Court until June, 1984, more than two months following the February 4, 1983 rejection of his claim by Defendant Rhoda Herschler Greenberg, functioning as Executrix of the Estate of Jennie Mandel Barnette"

The referee concluded that the New York judgment should not be accorded full faith and credit and recommended that the trial court grant appellant's motion to vacate the judgment. Appellant filed objections to the referee's report, in response to which appellees filed an opposing memorandum. On October 21, 1988, the trial court adopted in full the report of the referee and thereby vacated the judgment, and appellant thereafter filed the instant timely appeal.

Being related, the first four assignments of error will be discussed together. Appellant essentially contends that the trial court erred by vacating the judgment against appellees.

The referee's report, as adopted by the trial court, stated that appellees had presented evidence of three possible defenses to appellant's claim: (1) that New York lacked personal jurisdiction over appellees; (2) that Barnette had owned the diamond rings and was not retaining them pursuant to a contract or trust agreement for appellant's benefit; and (3) that appellant failed under the pertinent provisions of the probate code to timely bring his claim against the estate. To the extent the trial court vacated the judgment on the merits, that is, on the ground that no contract or trust agreement existed, the vacation was clearly erroneous. The Full Faith and Credit Clause of Section 1, Article IV, United States Constitution, requires Ohio to give the same res judicata effect to the New York judgment that New York would give it. Durfee v. Duke (1963), 375 U.S. 106, 109. As to the first and third reasons given by the referee and adopted by the trial court as

authorizing vacation of the judgment, we note that jurisdiction in New York was ostensibly premised on New York's long-arm statute, which permits the exercise of jurisdiction over any non-domiciliary, or his executor or administrator who does any of the following:

"2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

" 3. [C]ommits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

"(i) [R]egularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

"(ii) (E)xpects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

"(4) Owns, uses or possesses any real property situated within the state." New York Civil Practice Laws and Rules 302.

Determination of whether jurisdiction was properly assumed over appellees is a matter of New York law. Litsinger Sign Co. v. American Sign Co. (1967), 11 Ohio St. 2d 1. The first paragraph of the Litsinger syllabus states in part:

"A Judgment of a sister state's court is subject to collateral attack in Ohio if there was no subject matter or personal jurisdiction to render the judgment under the sister state's internal law, and under that law the judgment is void ***." (Emphasis added.)

See, also, Speyer v. Continental Sports Cars, Inc. (1986), 34 Ohio App. 3d 272, first paragraph of the syllabus. The law of the state wherein the judgment was rendered, here, New York, must be examined in order to decide what effect that state would have given the judgment. Miller v. Bock Laundry Machine Co. (1980), 64 Ohio St. 2d 265; Fidelity Union Life Ins. Co. v. Canfield (1982), 7 Ohio App. 3d 229; see, also, Security Pacific Natl. Bank v. Roulette (1986), 24 Ohio St. 3d 17. To the extent the trial court relied on Civ. R. 60(B) to analyze appellees' attack on the New York judgment, the court was in error, as Civ. R. 60(B) is applicable only to voidable judgments and not those judgments that are void ab initio. As discussed at length in Litsinger, supra, only foreign judgments which are void are subject to collateral attack in Ohio. If the foreign judgment is merely voidable, relief must be sought in the foreign state.

Upon review of the referee's report, it appears that the referee failed to analyze the facts of this case under the relevant New York law. Although the referee, in Conclusion of Law No. 2, did refer to New York's long-arm statute, there is no indication that this conclusion was based on New York law, as it must be.

Moreover, the only testimony presented during the hearing held on appellees' motion to vacate concerned the long-arm statute as applied individually to Herschler and Greenberg. The referee's report makes no mention of evidence of Barnette's contacts with New York, albeit the affidavit submitted by Paul Scott referred to numerous contacts Barnette may have had with the rendering state. New York's long-arm statute

specifically allows for the exercise of personal jurisdiction over the executor or administrator of a non-domiciliary, thus making the inquiry into Barnette's contacts with New York essential to resolution of this issue.

Finally, even if it is found that under New York law, New York had jurisdiction over these appellees, then the trial court must determine whether appellant's claim was timely initiated against the estate of Barnette, given the time limitations of R.C. 2117.12. See In re Estate of Rettig (1964), 8 Ohio Misc. 38, syllabus.

Accordingly, the first four assignments of error are sustained to the extent that this cause is remanded to the trial court for a determination of first, whether New York properly assumed personal jurisdiction over appellees under New York law and, second, whether Ohio probate law bars appellant's claim against the estate of Barnette and Greenberg as executrix of the estate.

In his fifth assignment of error, appellant alleges error in the trial court's failure to rule upon appellant's motions which were pending at the time the court granted appellees' motions to vacate. Specifically at issue are a motion to compel and a motion for sanctions filed by Barnette's estate following appellant's failure to appear for a scheduled deposition and appellant's motion asking the court to reconsider its decision to grant appellees a hearing on the Civ. R. 60(B) motion and to stay enforcement of the judgment without a bond.

Appellant has submitted no explanation of how

such failure to rule upon the motions will prejudice him and, consequently, any error in this regard must be deemed harmless. The fifth assignment of error is overruled.

Accordingly, appellant's first four assignments of error are sustained and the fifth assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is hereby affirmed in part and reversed in part and this cause is remanded to that court for further proceedings in accordance with law and this opinion. Judgment affirmed in part and reversed in part; cause remanded.

REILLY, P.J., and BRYANT, J., concur.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Jonathan C. Scott,

Plaintiff,

VS.

Estate of Jennie Mandel Barnett,
et al.,

Defendant.

Foreign Judgment

Case No. 86JG-08-202844

Judge Paul W. Martin

JUDGMENT ENTRY

This matter came to be heard on the pleadings, testimony and other evidence, memorandums of law, and the report of the Referee filed August 4, 1988. The Court finds that the Referee's findings of fact, conclusions of law, and recommendations to the Court are supported by reliable, probative and substantial evidence and are in accordance with law. Plaintiff's objections to the Referee's report are not well taken and are hereby overruled. The Court hereby approves and adopts the said findings, conclusions and recommendations of the Referee.

The motions of Defendant Estate of Jennie Mandel Barnett and Defendants Rhoda Herschler Greenberg and Michael Herschler, respectively, to vacate the foreign default judgment which is the subject of this action, for good cause shown, are

well taken and are hereby sustained, and, therefore, it is hereby ORDERED that said judgments be, and hereby are, vacated. Costs shall be paid by Plaintiff.

s/ Paul W. Martin, Judge

Approved:

s/
Douglas E. Hoover (H00001)
Attorney for Plaintiff

s/ Steven M. Soltis (SOL03)

s/ Richard B. Igo (IG003)
Attorneys for Defendants

(2)

90-1404

Supreme Court, U.S.
FILED
MAR 26 1991
OFFICE OF THE CLERK

NO. 90-1404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JONATHAN C. SCOTT,

Petitioner,

vs

ESTATE OF JENNIE MANDEL BARNETT, RHODA HERSCHLER GREENBERG AND MICHAEL HERSCHLER,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO, TENTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state court constitutionally may refuse to enforce a default judgment rendered in another state when, following a plenary hearing, it finds that the first court lacked either subject matter or *in personam* jurisdiction, or both, over the defendants against whom enforcement of the purported judgment is sought.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JONATHAN C. SCOTT,

Petitioner,

vs

ESTATE OF JENNIE MANDEL BARNETT, RHODA HERSCHLER GREENBERG AND MICHAEL HERSCHLER,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO, TENTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Estate of Jennie Mandel Barnett, Rhoda Herschler Greenberg and Michael Herschler respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinions of the Court of Appeals of Ohio, Tenth Appellate District (hereinafter "Court of Appeals") which is reproduced beginning at pages A.2 and A.8, respectively, of Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS AND OF THE CASE

Unfortunately, Petitioner's Statement of the Case contains inaccurate statements. Jennie Mandel Barnett died September 24, 1982, domiciled in Franklin County, Ohio. The Franklin County Probate Court appointed Respondent Rhoda Herschler Greenberg executor of her estate on November 5, 1982.

On January 24, 1983, Petitioner's Attorney wrote a letter to Respondent Greenberg, as executor, demanding return to him of certain diamond rings allegedly comprising the *res* of a supposed oral trust agreement made between Petitioner's father, Paul Scott, as trustor, and the decedent, who was Paul Scott's mother, as trustee. Petitioner alleged that he was the beneficiary of this supposed trust. The attorney's letter warned that if Respondent failed to return the rings by February 4, 1983, Petitioner would file suit against the estate for money damages. Respondent Greenberg made no response whatever to the attorney's letter.

Not until seventeen months after the deadline given for return of the rings, namely, in June, 1984, did Petitioner file his lawsuit for damages; and he filed in a state court in New York, not in Ohio. In addition to naming the estate as a defendant, he sued Mrs. Greenberg individually and her former husband, Michael Herschler, both Ohio residents. Petitioner alleged that the individual defendants obtained the subject rings from the decedent and converted them.

None of the defendants (Respondents herein) filed a responsive pleading or otherwise appeared in the New York action. As a result, that court entered a default judgment against the defendants for money damages, the judgment Petitioner sought to enforce in the Ohio proceedings below.

Respondents herein filed timely motions in the Franklin County, Ohio common pleas court to vacate the foreign judgment after Petitioner had it certified and filed in that court. The individual defendants argued that none of the provisions of the New York "long-arm" statute applied to them. The estate contended that the alleged trust agreement never, in fact, was made, and therefore, that New York lacked personal jurisdiction over the decedent and/or her estate under the long-arm statute. Further, the estate maintained that the Ohio "non-claim" statutes, Sections 2117.06, 2117.11, and 2117.12, Ohio Revised Code, barred Petitioner's claim, inasmuch as the claim, namely, the demand for return of the rings, had been rejected as a matter of law by the executor's absolute failure to respond to it by February 4, 1983, the deadline, and inasmuch as Petitioner had failed to file his lawsuit within two months following rejection of the claim, as required by Section 2117.12

After a full hearing on the motions, at which Respondents Greenberg and Herschler testified, the court agreed with the contentions made by Respondents that the New York court lacked jurisdiction over them, and that the non-claim statutes barred Petitioner's claim against the estate. Therefore, it vacated the foreign judgment. Neither Petitioner nor his father nor any witnesses on their behalf were present at the hearing, although they were represented there by their attorney who cross-examined the witnesses.

In its opinion of May 10, 1990, the court of appeals did not disturb the trial court's factual findings, but remanded the matter to that court, instructing it to specifically consider and discuss the applicability to Respondents of the New York long-arm statute. In its opinion of August 28, 1990, reconsidering its first decision, the court of appeals

further agreed that Petitioner's attorney's aforesaid letter triggered the operation of the Ohio non-claim statutes in favor of the estate; however, it remanded for the common pleas court to determine whether the estate waived that defense by failing to raise it in New York. See, Petition for Writ of Certiorari at A.4 and A.5.

On November 28, 1990, the Ohio Supreme Court overruled the parties' respective motions directing the court of appeals to certify its record, finding that no substantial constitutional question was involved. See, Petition for Writ of Certiorari at A.1. That action resulted in Petitioner's present petition for writ of certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

Prior decisions of this Court and lower courts are controlling and support the opinions below. Furthermore, other authorities support the decisions below.

A court must have both *in personam* and subject matter jurisdiction in order to render a valid judgment. Restatement (Second) of Judgments, Sec. 81 (1982). If it lacks either, its judgment is void and is not entitled to recognition in the state where rendered or elsewhere. Id.; Restatement (Second) Conflict of Laws, Secs. 104-105 (1971).

A court's jurisdiction is always open to judicial inquiry in a subsequent action to enforce that court's judgment, especially if the judgment was rendered by default; and such inquiry is not prevented by the Full Faith and Credit clause of the Constitution. *Adam v. Saenger*, 303 U.S. 59, 62 (1938). And, as a corollary, if a matter of fact upon which the court's jurisdiction depends was not litigated in the first action, as necessarily is the case when the judgment is by default, that matter may be adjudicated in the subsequent judgment-enforcement action. *Id.*; Restatement (Second) of Judgments, Sec. 81 comment a (1982). New York recognizes this principle. *Royal Zenith Corp. v. Continental Ins. Co.*, 63 N.Y.2d 975, 473 N.E.2d 243 (1984).

In this case, the existence or not of the alleged oral trust agreement is a jurisdictional fact. That is, if the agreement existed and was made in New York, New York probably would have *in personam* jurisdiction over the decedent and/or her estate pursuant to that provision of the long-arm statute referring to "transact[ing] any business within" that state. See, Petition for writ of Certiorari at 19. But New York would not have jurisdiction if the supposed agreement never, in fact, had been made, notwithstanding

the fact the decedent may have been a New York resident at one time. *Inkelas v. Inkelas,* 58 Misc.2d 340, 295 N.Y.S.2d 350 (Sup. Ct. 1968); *Sun System Prefabricated Solar Greenhouses, Inc. v. Venuti,* 596 F. Supp. 1516 (E.D.N.Y. 1984).

On page 18 of his Petition for Writ of certiorari, Petitioner states that "[i]t is unrefuted" that the decedent entered into the alleged trust agreement. However, the evidence presented in the Ohio proceedings (that being, of course, the first time Respondents' position was presented in a judicial forum on these issues) established that no such agreement had been entered into. That evidence clearly showed that the decedent was the absolute, unconditional owner of the subject rings, not a trustee of them. Furthermore, Respondents presented uncontradicted, unimpeached evidence that the individual defendants (Respondents) had committed no acts that would have brought them within the coverage of the long-arm statute. Thus, the Ohio courts were entirely justified in so finding as fact. And as a matter of law, they were justified in finding that New York acquired no personal jurisdiction over any of the Respondents.

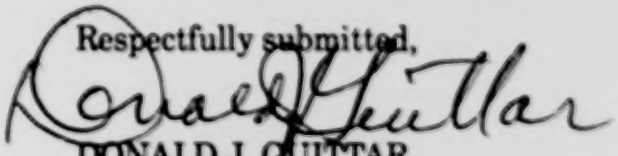
In addition, as indicated above, the Ohio courts have held that the Ohio non-claim statutes apply in this case if they were not waived. Respondents will cite ample Ohio authority on remand to the common pleas court to the effect that those statutes are jurisdictional and that they may not be waived. The correctness of Ohio's interpretation of its statute in this case, of course, is a matter of state law, and does not raise a federal question. Therefore, Petitioner's claim was "forever barred" (Section 2117.12, Ohio Revised Code, *supra*), and his New York "judgment" is not enforceable against the Respondent estate in Ohio. *In re Rettig,* 8 Ohio Misc. 38, 216 N.E.2d 924 (P.C. Hamil-

ton Co. 1964), *aff'd. without opinion* (Ct. App. No. 9613) (May 3, 1965) (refusing to enforce foreign judgment rendered contrary to non-claim statutes); *Crosson v. Conlee*, 745 F.2d 896, 902-03 (4th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (refusing to permit such a judgment to be entered in first instance). See, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516-17 (1953).

CONCLUSION

When asked to enforce the New York default judgment against Respondents, the Ohio courts were entitled to inquire into the New York court's *in personam* and subject matter jurisdiction, or lack thereof. After a plenary hearing at which Respondents testified, and at which Petitioner and/or his witnesses were entitled to testify, but chose not to, the Ohio court was entirely justified in finding that New York, in fact, did not acquire jurisdiction over Respondents. It was further justified in finding that Petitioner did not comply with the Ohio non-claim statutes when he failed to file suit within two months following the rejection of his claim against the estate. Consequently, the Ohio court was entitled to vacate the judgment as to all Respondents and to refuse to enforce it. Petitioner thus has demonstrated no error below justifying intervention by this Court.

Respectfully submitted,



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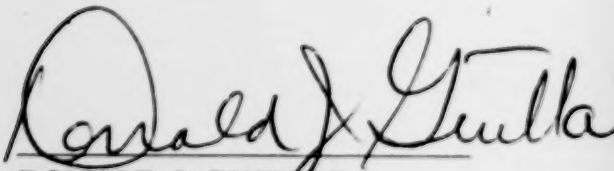
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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing, Respondents' Brief in Opposition have been served upon petitioner, Jonathan C. Scott, by mailing such copies to the office of petitioner's counsel of record, Ronald Podolsky, 15 Park Row, New York New York 10038, by U.S. Mail First Class postage prepaid, this 26th day of March, 1991.

I further certify that all parties required to be served have been served.



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